

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

MARGIE McRAE,	)	CIVIL ACTION NO. 06-1999 MJJ
)	
Plaintiff,	)	RESPONSE TO MOTION TO
	)	DISMISS COMPLAINT UNDER
vs.	)	FRCP 12(B)(5) FOR FAILURE
	)	TO SERVE
JOANNE BARNHART, Commissioner of)	
the SOCIAL SECURITY	)	AND
ADMINISTRATION, MARK W. EVERSON,)	
Commissioner of the INTERNAL REVENUE	)	MOTION FOR RULE 4(m) OR
SERVICE, KAREN GILES AND PHYLLIS	)	RULE 6(b)(2) ENLARGEMENT
SCADUTO,	)	OF TIME
)	
Defendants.	)	Date: November 14, 2006
	)	Time: 9:30 a.m.
	)	Place: Courtroom 11, 19 th Floor
	)	450 Golden Gate Avenue
	)	San Francisco, CA
	)	Judge: Hon. Martin J. Jenkins

1.

Plaintiff objects to defendant's Motion to Dismiss based on Federal Rule of Civil Procedure 4(m), as the record does not support failure of service.

2.

Plaintiff filed this action on March 15, 2006 and amended the complaint on March 16, 2006.

Plaintiff made arrangements for personal service without delay. Global Messenger Corp., 1821 Washington Blvd, Baltimore, Maryland 21230, served the Attorney General at 950 Pennsylvania Avenue in Washington, D.C., the IRS Commissioner at 1111 Constitution Avenue in Washington, D.C., and the Social Security

Commissioner at 1508 Woodlawn Drive in Baltimore, Maryland, all on April 13, 2006. Global Messenger Service is experienced in serving the Federal Government and was selected by plaintiff for that reason.

3.

Benny Jones, an Alameda County process server, served Karen Giles and Phyllis Scaduto on April 17, 2006. The five returns of service were personally filed with this court by plaintiff on April 28, 2006 along with the original summons, copies of which had been served with the *complaint*.

4.

On April 12, 2006, Carrie Hammer of the General Counsel's office in Baltimore called plaintiff and asked plaintiff not to directly contact Ms. Giles and Ms. Scaduto. Plaintiff explained to Ms. Hammer that she had served those defendants directly with the amended complaint only because no attorney had been identified at that time. (Declaration of Margie McRae). Plaintiff explained that the call to her home, her unbuffered sanctuary, was stressful, and requested that future contact be made by mail. Ms. Hammer explained that she had access to plaintiff's telephone number because of plaintiff's work with the Social Security Administration. (Declaration of Margie McRae). Plaintiff, a physician, has always had a private, *unlisted home telephone number* and has always used a postal address, even before working for the California Department of Corrections, high risk employment enhancing the necessity for confidentiality and privacy. Plaintiff has never been on line and has no E-mail service. (Declaration of Margie McRae).

5.

In a letter dated May 5, 2006, Assistant U.S. Attorney Jonathan U. Lee advised plaintiff that she had “not properly served the United States or its agencies or employees.” Though the Attorney General had been served, the United States Attorney for the district had not been served. On May 15, 2006, plaintiff served the Civil Process Clerk for the U.S. Attorney by certified mail and notified Assistant U.S. Attorney Jonathan U. Lee that she had done so in a letter on the same date (Exhibit A). It was signed for on May 16, 2006 and when the proof of delivery was returned, it was forwarded to this court by United States Postal Service Priority Mail with delivery confirmation on June 23, 2006 (Exhibit B).

A copy was subsequently sent to Attorney Lee, but apparently the enclosure was missing. Exhibit C is a copy of the United States Postal Service Certificate of Mailing from the second mailing to Attorney Lee.

6.

When plaintiff received defendant’s Motion to Dismiss, she went to the court and learned that service on the Attorney General was in the case file, but not noted in the computer log. Apparently that was because the Attorney General was not a named defendant. The information has now been added to the computer log. (Declaration of Margie McRae).

7.

Plaintiff made several telephone calls to Attorney Lee, wrote letters, and even stopped by his office to arrange a schedule for “meet and confer”. (Exhibit D).

Eventually, there was a meeting in the Federal Building in San Francisco and arrangements were made to meet again in early October to make initial disclosure. (Declaration of Margie McRae and Exhibit E).

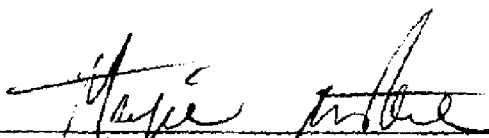
8.

On October 2, 2006, plaintiff notified defendant that an answer was past due and requested an answer to avoid another Order to Show Cause (Exhibit E). Immediately thereafter, defendant filed this Motion to Dismiss.

9.

If personal service is precluded by Federal Rule of Civil Procedure 4, plaintiff's service may be defective, but Rule 4(m) is not to be construed harshly and the 120-day time limit is not absolute, Commentary C4-38 to Federal's Rule of Civil Procedure Rule 4(m), and the court is empowered to extend time, perhaps even if good cause is lacking, Commentary C4-41 to Federal Rules of Civil Procedure Rule 4. The court also is empowered to extend time under Rule 6(b)(2). Failure to prosecute is not the case here. The evidence shows that plaintiff has tried diligently to process this case, and plaintiff moves this court pursuant to Rules 4(m) and 6(b)(2) for an extension of time to serve defendants, again, by certified mail or registered mail if, and only if, the personal service for which she paid so much is prohibited by the Federal Rules of Civil Procedure.

BY:


MARGIE McRAE, Plaintiff

Dated: October 28, 2006

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MARGIE McRAE,	)	CIVIL ACTION NO. 06-1999 MJJ
)	
Plaintiff,	)	RESPONSE TO MOTION TO
	)	DISMISS COMPLAINT UNDER
vs.	)	FRCP 12(B)(5) FOR FAILURE
	)	TO SERVE
JOANNE BARNHART, Commissioner of)	
the SOCIAL SECURITY	)	AND
ADMINISTRATION, MARK W. EVERSON,)	
Commissioner of the INTERNAL REVENUE	)	MOTION FOR RULE 4(m) OR
SERVICE, KAREN GILES AND PHYLLIS	)	RULE 6(b)(2) ENLARGEMENT
SCADUTO,	)	OF TIME
)	
Defendants.	)	Date: November 14, 2006
	)	Time: 9:30 a.m.
	)	Place: Courtroom 11, 19 th Floor
	)	450 Golden Gate Avenue
	)	San Francisco, CA
	)	Judge: Hon. Martin J. Jenkins

PROPOSED ORDER

This court finds that plaintiff's personal service on the five parties meets the requirements of Rule 4 even though it is personal service rather than by mail.

Defendant's Motion to Dismiss is denied.

Dated:

The Honorable Martin J. Jenkins
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MARGIE McRAE,)	CIVIL ACTION NO. 06-1999 MJJ
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Defendants.)	Date: November 14, 2006
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)	Place: Courtroom 11, 19 th Floor
)	450 Golden Gate Avenue
)	San Francisco, CA
)	Judge: Hon. Martin J. Jenkins

PROPOSED ORDER

Plaintiff has made a good faith attempt at service on defendants. Personal service is not effective as service must be by certified or registered mail.

The evidence shows that plaintiff has been diligent in the prosecution of this case and this court finds good cause for granting an extension pursuant to Federal Rules of Civil Procedure Rule 4(m).

Dated:

The Honorable Martin J. Jenkins
United States District Court Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

MARGIE McRAE,)	CIVIL ACTION NO. 06-1999 MJJ
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)	450 Golden Gate Avenue
)	San Francisco, CA
)	Judge: Hon. Martin J. Jenkins

PROPOSED ORDER

Plaintiff has made a good faith attempt at service on defendants. Personal service is not effective as service must be by certified or registered mail.

The evidence shows that plaintiff has been diligent in the prosecution of this case and this court finds good cause for granting an extension pursuant to Federal Rules of Civil Procedure Rule 6(b)(2).

Dated:

The Honorable Martin J. Jenkins
United States District Court Judge

EXHIBIT A

Margie McRae
Box 24818
Oakland, CA 94623-1818

May 15, 2006

Jonathan U. Lee, Esq.
Assistant U.S. Attorney
Northern District of California
10th Floor, Federal Building
450 Golden Gate Avenue, Box 36055
San Francisco, CA 94102-3495

Dear Mr. Lee:

I am in receipt of your letter dated May 5, 2006. Under separate cover, I have sent the complaint to the civil process clerk at the office of the United States Attorney, where you are located, by certified mail. You indicated that the United States has 60 days to answer, but it is my understanding that Social Security has 90 days.

My letter was sent to the employees because the District Court schedule is rather tight. I wanted to be in compliance, but had received no information as to the identity of the U.S. Attorney assigned to the case. I explained that to Carrie Hanmer when she called from the General Counsel's office in Baltimore on May 12.

We do need to meet and confer, to the extent possible, to adhere as closely as possible to the Court's schedule. I plan to be out of pocket for a while, but I shall retrieve any interval correspondence from you on my return.

For the initial document exchange, I want all the documents I requested in my FOIA request to the Social Security Administration, a copy of which will be sent to you when we set a schedule to meet and confer. You understand, surely, that comparative information is important in the

genre of cases.

It had been my plan to reserve a conference room in Oakland, but the civil tone of your letter makes me comfortable meeting at your facility, if you wish.

Enclosed is a copy of the packet I sent. I have no intent of further contact with the employees, now that I know you are the person to contact, as I know that would be improper.

Please be reminded that I seek no monetary damages from the IRS, only an opinion as to my worker status.

Cordially,

H. A. Lee

Margie McRae, MD

Enclosures:

- 1. Complaint and Amended Complaint**
- 2. Meet and Confer letter**

U.S. POSTAL SERVICE		CERTIFICATE OF MAILING	
MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL DOES NOT PROVIDE FOR INSURANCE POSTMASTER			
Received From:		0000	
Miriam M. Miller		44	
Box 24810		44	
Oakland, CA 94623-1810		44	
One piece of primary mail addressed to		00066224-10	
Jonathan W. Lee, Esq.		\$0.95	
Last US Attorney		PAID	
Northern District of California		OAKLAND, CA	
10th Fl Federal Bldg		94615-05	
450 Golden Gate Ave		MAY 13, '95	
		AIRMAIL	
		U.S. POSTAGE	
		AIRMAIL	

EXHIBIT B

Margie McRae, M.D.
Box 24818
Oakland, CA 94623-2828

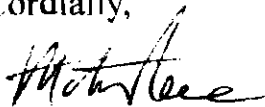
August 21, 2006

Jonathan U. Lee, Asst. U.S. Attorney
Office of the U.S. Attorney
450 Golden Gate Ave. - 11th Floor
San Francisco, CA 94102-3495

Dear Mr. Lee:

Enclosed find proof of service on your office. Proof of service on the Attorney General was filed as was this document and can be found in the file if you have questions.

Cordially,

A handwritten signature in black ink, appearing to read "Margie McRae", written in a cursive style.

Margie McRae, M.D.

EXHIBIT C

U.S. POSTAL SERVICE **CERTIFICATE OF MAILING**

MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL. DOES NOT PROVIDE FOR INSURANCE-POSTMASTER

Received From: *Mr. McRae*
Box 34418
Oakland CA 946

One piece of ordinary mail addressed to:
Joseph H. Lee, Post M.S. McRae
10th Floor Federal Bldg
450 Golden Gate Tower
San Francisco, CA 94102-34

PS Form 3817, January 2001

C000



00361134-1

\$0.95

U.S. POSTAGE
 PAID
 OAKLAND, CA
 SEP 14, 06
 HMO

U.S. COURT
 FEDERAL JUDICIAL
 DISTRICT OF
 SOUTHERN DISTRICT OF CALIFORNIA

IN RE: ACTION NO. 06-1999 MJJ

Defendant

PLAINT

NOTICE

IN GOVERNMENT DEFENDANTS

Attached hereto is the return of service on the government agency defendants.

IRS and Social Security Administration

BY:

George McRae
 GEORGE MCRAE, Plaintiff

Dated: June 27, 2006

U.S. Postal Service Delivery Confirmation Receipt

Postage and Delivery Confirmation fees must be paid before mailing.

Article Sent To: (to be completed by mailer)

Return of Service letter
Post Office

DELIVERY CONFIRMATION NUMBER: 0092 0000 0000 0121 00



POSTAL CUSTOMER:

Keep this receipt. For inquiries: Access internet web site at www.usps.com or call 1-800-222-1811

CHECK ONE (POSTAL USE ONLY)

EXHIBIT D

Margie McRae
Box 24818
Oakland, CA 94623-1818

June 10, 2006

Jonathan U. Less, Esq.
Assistant U.S. Attorney
450 Golden Gate Avenue, 10th Floor
San Francisco, CA 94102-3495

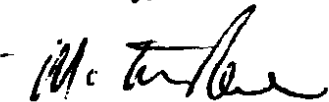
Re: Case # 06-01999 MJJ

Dear Mr. Lee:

On June 9, I stopped in at your office because I was in the area. You were apparently in a deposition. I called on or about June 8. Clearly we can not meet the Court's schedule as your answer is not even due yet, so I shall ask for a continuance.

Kindly let me know if you are also representing IRS, as I have received no correspondence from them.

Cordially,



Margie McRae

U.S. POSTAL SERVICE		CERTIFICATE OF MAILING	
MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL, DOES NOT PROVIDE FOR INSURANCE-POSTMASTER			
Received From:			
<i>M. McRae</i>			
<i>Box 24818</i>			
<i>Oakland, CA 94623-1818</i>			
One piece of ordinary mail addressed to:			
<i>Jonathan U. Less, Esq.</i>			
<i>Asst. U.S. Atty., N.D. Cal.</i>			
<i>450 Golden Gate Ave. Fed Bldg 10th Fl</i>			
<i>San Francisco, CA 94102-3495</i>			

PS Form 3817, January 2001

0000
UNITED STATES
POSTAL SERVICE
SAN FRANCISCO, CA 94108-09
JUN 10 2006
\$0.95
AMOUNT
FROM 1st CLASS

Margie McRae
Box 24818
Oakland, CA 94623-1818

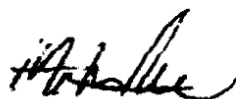
July 19, 2006

Jonathan U. Lee, Esq.
450 Golden Gate Ave., 10th FL
San Francisco, CA

Dear Mr. Lee:

Your letter was received a few hours before I left town. I prefer to meet and confer in person and am willing to come to your office. Any time during the week of July 31 is fine. I prefer early morning to the extent possible.

Cordially,



Margie McRae

U.S. POSTAL SERVICE		CERTIFICATE OF MAILING	
MAY BE USED FOR DOMESTIC AND INTERNATIONAL MAIL. DOES NOT PROVIDE FOR INSURANCE—POSTMASTER			
Received From:			
M. McRae			
Box 24818			
Oakland, CA 94623-1818			
One piece of ordinary mail addressed to:			
Jonathan U. Lee, Esq.			
U.S. Attorney's Office			
450 Golden Gate Ave., 10 th FL			
San Francisco, CA 94102			

PS Form 3817, Mar. 1989

U.S. POSTAGE
PAID
JUL 19 2006
JUL 19 2006
FACOUNT

\$0.95
0004833-05



0000

GPO : 1993 O - 151-051

EXHIBIT E

Margie McRae, M.D.
Box 24818
Oakland, CA 94623-1818

October 2, 2006

Jonathan U. Lee, Asst U.S. Attorney
Northern District of California
450 Golden Gate Ave., 10th Floor
San Francisco, CA 94102

Dear Mr. Lee:

Your answer is past due. I have already received an Order to Show Cause for not filing for default judgment. Please file your answer as soon as possible as I do not wish to receive another order.

We had planned to meet this month. Unfortunately, I have professional meetings and other commitments and the 13th is the only day I shall be available. We can meet very early in the morning or 1:00 p.m. or 4:30 p.m. If that does not work for you, the first part of November is available. Please let me know.

Your cooperation is appreciated.

Cordially,

A handwritten signature in black ink, appearing to read 'Margie McRae', written in a cursive style.

Margie McRae, M.D.

Flat Rate Envelope

Flat Rate postage regardless of weight, destination or type of mailable material enclosed. Domestic use only.

Case 3:07-cv-01538-MJJ Document 11-3 Filed 07/02/2007 Page 22 of 22

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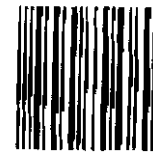
PLEASE PRESS FIRMLY

PLEASE PRESS FIRMLY

PLEASE PRESS FIRMLY



0000



94102

U.S. POSTAGE
PAID
OAKLAND, CA
94612
OCT 28, '06
AMOUNT

\$4.55
00051603-05



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MAIL**

UNITED STATES POSTAL SERVICE®

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HOW TO USE:

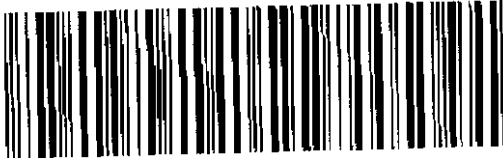


1. COMPLETE ADDRESS AREA

Type or print return address and addressee information

United States Postal Service®

DELIVERY CONFIRMATION™



0306 1070 0002 3799 6524



4. Bring your Priority Mail package to a post office, present it to your letter carrier, or call 1-800-222-1811 for pick up service. Stampad mail may be deposited in a collection box **ONLY** if it weighs less than 16 ounces.

From:

McKibben (M)
Box 24878
Oakland, CA 94623-1818

To:

Jonathan H. Lee
Asst. U.S. Attorney
10th Fl Federal Bldg
450 Golden Gate Pkwy, Box 36055
San Francisco, CA 94102-3498

▲ Complete address information or place label here ▲

The convenient Flat Rate Envelope.

One low price for fast delivery anywhere in the U.S., regardless of weight,